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EDWARD LIVINGSTON, AND THE
LOUISIANA CODES.

NEW discoveries are apt to prove rediscoveries. A new method in science or a new principle in philosophy is sometimes discovered, before the world is fitted to assimilate it, and so it falls into oblivion. Generations pass, and the same method or principle is again discovered through some wholly independent and original process; and then, because the fullness of time has come, it may mark a new era in science or philosophy. Some illustrations of such duplicated discovery occur in the development of the Science of Penology or Prison Science; a science so young in years that it can hardly be said to have had an existence in any working system before the present generation. In the treatment of convicts, with a view to their reformation, it has been found by experiment desirable that their situation in prison should be rendered as closely *like* that of free workmen outside as is consistent with discipline. They are thus subjected to the same kind of desires and motives that, in common life, are ordinarily sufficient to restrain men from crime; and when discharged from prison, they are thus prepared to adjust themselves more readily to the new conditions. A convict in prison cannot well learn, for example, the value of money and economy in the use of it without some actual experience in the management of money. In the experimental application of this principle, Mr. Brockway introduced into the Elmira Reformatory a few years ago, a system of book-keeping by which a separate account was opened with each convict. The convict was treated like a free workman; he was charged in account with the cost of his living, board, clothing, bedding, tools, and was credited with wages for his labor. The plan was regarded as a novel and most striking experiment based upon correct scientific principles. I think it would surprise Mr. Brockway, and those who applauded this as an entirely new and original departure, to learn that an Act was passed by the Legislature

of New York in the year 1801, which provided for the establishment in the State Prison of a system of separate accounts with each individual convict, of precisely the same character with the system evolved by Mr. Brockway nearly a century later. Whether the system was ever actually used in the State Prison, then located at Greenwich, in the City of New York, I have no means of knowing. But 1801 was the year in which Edward Livingston was elected Mayor of the City of New York, and the fact that he afterward embodied in his celebrated Penal Code for Louisiana a like provision affords presumptive evidence that he was the author of this wise measure of prison discipline.

Edward Livingston was a very prominent figure in the early history of the United States. He belonged to a family which held a distinguished position in political and public life, both before and after the Revolution. The founder of the family was Colonel Robert Livingston, a Scotchman, who came to this country in the seventeenth century. He acquired a vast tract of land on the east side of the Hudson River above Poughkeepsie, where he established his residence, a place famous in history as the "Livingston Manor." A grandson of Colonel Livingston was Robert R. Livingston, for many years an honored Judge of the Supreme Court of the Colony of New York. This Judge Livingston had, among other children, two sons who attained the highest distinction. The elder of these, named after his father, Robert R. Livingston, had the honor of being one of the committee of five appointed to draft the Declaration of Independence; he held the important office of Secretary of Foreign Affairs during the War of the Revolution; afterward became Chancellor of the State of New York, a position he filled for many years with distinguished ability, and, during President Jefferson's administration, was United States Minister to France where he negotiated the Louisiana Purchase.

Edward Livingston, the subject of the present sketch, was the youngest brother of Chancellor Livingston and nearly twenty years his junior. He was born on the ancestral estate in 1764. He was graduated at Princeton College in 1781, when seventeen years of age. His college

course was during the tumultuous period of the Revolutionary War, of which Princeton was one of the storm centers. The excitement of the war, hostile to the quiet pursuit of learning, had nearly depleted Princeton College, and Livingston's class was graduated with only six members. Immediately after graduation, he entered upon the study of the law at Albany, in the office of John Lansing (afterward Chancellor of New York) and, upon the evacuation of New York City by the British in 1783 he removed to that city, where he was admitted to the Bar in 1785, at twenty-one years of age.

Edward Livingston entered upon his career under the most favoring auspices. He was a young man of winning and attractive manners, of genial disposition, of irreproachable character, a thoughtful and diligent student, endowed with extraordinary natural abilities and backed by a large and most influential family connection. His rise was rapid, as could not but be anticipated; but it was only by unusual powers of intellect and of application that he deserved and won a high standing at the bar of New York. That bar comprised the most eminent and experienced lawyers in the country, among whom were numbered Alexander Hamilton, Aaron Burr, Brockholst Livingston and James Kent.

In 1794 Livingston was elected member of Congress from New York, and served three successive terms, being twice re-elected. He made some notable speeches in the House, and his congressional career served to widen his acquaintance and enlarge his reputation. In the Presidential election which resulted in a tie vote for Thomas Jefferson and Aaron Burr, Livingston declared in favor of Jefferson, and by the warm and constant advocacy of his cause placed Jefferson under a deep sense of personal gratitude. This found expression in the appointment of Livingston as United States District Attorney for the District of New York, which then included the entire State.

At the close of his third term in Congress, Livingston having declined a renomination and returning to New York, he was, the next year (1801), elected Mayor of the City of New York. In the administration of this office he gained distinction, which still further added to his renown and in-

fluence. The Mayor's Court, already an important tribunal, gained added dignity from the ability and learning with which Livingston decided the causes upon its docket. In the summer of 1803 New York City was visited by one of its periodical epidemics of the yellow fever. The city was abandoned by those of the citizens whose circumstances permitted them to escape from the contagion; but Livingston, impressed with an honorable conviction of his duty as Mayor, remained at his post. Believing himself to be in a sense the father of his people, he fearlessly made daily visits to the houses where the disease was raging and personally administered to the sick, using his private resources to provide them with medicines and dainties. At last he was himself stricken down with the dread disease, and during his sickness his house was fairly besieged by the grateful citizens to whom his heroic conduct had greatly endeared him, all eager to do something to testify their anxious affection. Upon his recovery and after the epidemic had run its course and departed, it is easy to believe that Livingston was idolized by the people, who were ready to bestow upon him any preferment which it was within their power to grant.

It was just at this acme of his honor and his fortunes that Livingston was suddenly smitten with a disaster which immediately changed the whole current of his life. During his mayoralty he had continued to hold the office of United States District Attorney. While such a combination of offices at the present time is inconceivable, it does not seem to have occasioned then any suggestion of incongruity; but it necessitated a large dependence upon subordinate employees. It was suddenly discovered that a large amount of money belonging to the United States and collected by Livingston as District Attorney, had been embezzled by one of his trusted clerks. The only blame attaching to the District Attorney was that of negligence in making it possible for a clerk to commit such a defalcation. But it placed Livingston in the legal position of a defaulter and a debtor to the government in a sum which it was far beyond his ability to meet. He was overwhelmed with shame and mortification. Eager to make such reparation as he could, he immediately transferred all of his property toward payment of the debt and confessed judgment in

favor of the United States for one hundred thousand dollars: The net amount of the indebtedness remaining unpaid, after applying on it all the proceeds of his property, was afterward ascertained to be about forty-six thousand dollars, and it became thenceforth the one engrossing aim of Livingston's life to discharge that obligation.

He decided at once to abandon New York and to begin life anew in some other field. The newly acquired territory of Louisiana attracted him for several reasons. His studies had made him familiar with the Roman, Spanish and French systems of civil law, all of which entered into the law prevailing in the new territory. He anticipated a rapid development of the City of New Orleans, and thought that opportunities would be presented to him there of making investments in real estate from the rising values of which he would speedily realize sufficient profits to enable him to pay off his indebtedness to the government. He determined accordingly to migrate to New Orleans, cherishing the expectation that his absence from New York would be but temporary and that, within two or three years, he could return free from debt. The worldly wisdom of this decision may well be doubted; but, while resting under the ban of a defaulter before the law, his sensitiveness shrank from daily intercourse with those who had always held him in honor.

He reached New Orleans a stranger, provided with letters of introductions but personally acquainted with not one individual in the city. His fame as a lawyer seems to have preceded him, and that, sustained as it was by his extraordinary abilities and attractive personal qualities, won him an immediate success that was really phenomenal. The 7th day of February, 1804, was the date of his arrival; in the next following month of April he appeared as counsel in sixteen cases upon the court calendar for the April term, and the next month, May, in twenty-nine cases. He leaped at once to the very foremost position at the bar of New Orleans. This position he both deserved and maintained by severe, unremitting labor and by attainments and natural gifts which were quite unrivalled at that bar. He possessed an impressive eloquence; and all his speeches and writings that have been preserved are clear, forcible,

and bear the impress of profound and logical thought ; his literary style was vigorous but ponderous ; it rolled on with a deliberate affluence and grandiloquence of language which seems to have been highly effective seventy-five and even fifty years ago, though in broad contrast with the simpler, more direct and terse style demanded by modern taste. This criticism has no application, however, to the Codes, which are finished models of conciseness and mathematical exactitude of expression.

Louisiana was a new and wild country and the rate of legal fees was far beneath the ample scale of New York. Livingston's anticipations of the speed with which he could amass wealth in New Orleans was doomed to bitter disappointment. The expected two or three years of prosperous exile had lengthened out to twenty-three years of constant toil and effort, and yet that direful debt to the United States remained wholly unpaid. It then amounted, with interest, to one hundred thousand dollars. At last, in 1826, Livingston was able to effect a settlement with the government, by the terms of which he conveyed to the United States a plot of real estate, which he had acquired in the City of New Orleans, in full payment and extinguishment of the debt. Shortly afterward, the United States realized from the sale of such real estate over one hundred and six thousand dollars. The debt was thus fully discharged and Livingston, purged of all taint of dishonor, was at last free to return to the home and the friends of his early life. This long and steadfast sacrifice that he made and the exile he endured in the accomplishment of an honorable end have in them elements both heroic and pathetic.

Livingston was a prominent actor in the celebrated defense of New Orleans against the British in the War of 1812. General Jackson, whose acquaintance he had made in Congress twenty years before, appointed him his adjutant ; and, in that capacity, he rendered such efficient military service during the siege of the city as endeared him to the General's heart. There resulted a warm, life-long personal attachment between General Jackson and Livingston which in after years bore important results.

In 1823 Livingston became member of Congress and in 1829 he was elected United States Senator from Louisiana.

In 1831 he was chosen by President Jackson a member of the Cabinet as Secretary of State, and in 1833 he was appointed United States Minister to France. His public life and services in these successive offices are matters of general history which it would be out of place here to recount.

In 1828, by the will of his sister, Mrs. Montgomery, he became the owner of Montgomery Place, a large estate beautifully situated on the Hudson River, and portion of the ancestral Livingston Manor, where he established his home. There the closing part of his life was passed, in circumstances of affluence and great domestic happiness, and there he breathed his last in the year 1836, at the age of seventy-two years.

In this sketch of Livingston's life, I have reserved to the end a review of that part of his work upon which his fame distinctly rests and which will cause the memory of him as a pioneer in criminal law reform to be long cherished and honored. Livingston possessed a genius for the codification of law and his name must head the list of the eminent framers of law-codes in the modern world. Early in life he became a diligent student of the criminal law and deeply interested in prison reform. During his first terms in Congress he endeavored to secure, and afterward drafted a code to effect, a revision of the penal laws of the United States; and in 1805, the next year after his removal to New Orleans, he composed a Code of Civil Procedure regulating the practice in the courts of Louisiana, which was adopted by the legislature. It may cause an additional pang to the code-ridden lawyers of the present day, who suffer under a Code of Civil Procedure containing over three thousand sections and filling, when annotated, three enormous royal octavos, to learn that Livingston's Code of Civil Procedure was comprised in twenty-five pages; and there is no reason to believe that its concise brevity impaired its practical usefulness. Later, Livingston prepared a code of the entire civil law of Louisiana which was likewise adopted by the legislature and has ever since constituted the basis of the civil law of that State.

But the crowning work of Livingston's life was the Criminal Codes for the State of Louisiana which he composed, pursuant to an act of the legislature appointing

him commissioner for this purpose. The criminal law of Louisiana was in a hopelessly chaotic condition. Originally, Louisiana was a colony of Spain, governed, of course, by Spanish law. Later, it came, for a brief period, under the dominion of France. After its annexation to the United States, its legislature adopted, to a limited extent, the common law of England, but, except as modified by statute, the Spanish and French law prevailed. Further complication was caused through the enactment by the legislature of a series of conflicting penal statutes. The result became an undefined and inextricable medley of Spanish and French laws and usages, English common law and contradictory statute laws, which made the interpretation of the criminal law perplexed and doubtful, the mode of procedure uncertain, the rules of evidence largely discretionary and the consequent miscarriage of justice frequent and inevitable.

In 1820 the legislature of Louisiana passed an act declaring that a code of criminal law should be founded on one principle, namely, the prevention of crime, and, in view of the defects of the existing system, providing for the appointment of a commissioner to prepare such a code. Edward Livingston was appointed the sole commissioner, and he entered at once upon the work. He devoted four years of severe labor to this undertaking, examining and comparing the criminal systems of other States and countries and corresponding with the most prominent jurists at home and abroad. The work was completed by the production of four distinct codes; one of Crimes and Punishments, one of Procedure and one of Evidence in criminal cases and a Code of Reform and Prison Discipline. Each code was accompanied with an elaborate report explanatory of the reasons and principles underlying its provisions. The manuscript was entirely ready to go to the hands of the printer, and Livingston, having spent the evening in making the final corrections, retired at a late hour. Before morning he was aroused by an alarm of fire which had broken out in his library. The manuscript was utterly destroyed, and not only that but all the notes and memoranda upon which it was based were burned to ashes. Hardly a vestige of four years' toil survived except what remained indelibly im-

pressed on the author's memory. It will be remembered that a similar calamity befell Thomas Carlyle in the destruction of the manuscript of the French Revolution. That was a distinct loss to the world, for, though Carlyle rewrote the book, its value is impaired by the constant assumption that the reader is already intimately acquainted with all the facts and characters involved, which remained vivid in the author's mind. Like Carlyle, Livingston immediately set himself to the work of reproduction, but, unlike Carlyle's French Revolution, I believe that the codes gained added exactness and harmony from the rewriting. It cost Livingston, however, two years more of hard labor before the codes were again completed and published.

Seventy-five years have since elapsed and yet it is probably safe now to say that these codes embody the most comprehensive and enlightened system of criminal law that has ever been presented to the world. They constitute a thesaurus from which the world has ever since been drawing ideas and principles. The Code of Reform and Prison Discipline is especially striking from the breadth of its view, and in some particulars its wisdom is yet in advance of even the present age. No intelligent summary of the vast scheme elaborated in these codes can be attempted within the limits of this paper. It is only possible to speak of one or two of their salient features, which have an important bearing on the unsolved problems which confront us to-day.

Idleness is the most prolific source of crime. Every community is formed of two divisions; those who support themselves by their own labor or resources and those who do not. The latter division must derive its support from the former division, either through charity, public or private, or by committing crime. But among those who do not support themselves is a class made up of those persons who can work and are willing to work, but cannot find employment. This class of honest unemployed workmen may well excite, not only the keenest sympathy, but also the most grave solicitude. Hanging on the edge of starvation and desperation, unless a helping hand is extended to them, they are in acute danger of falling into crime. How to help this class and to save them from becoming criminals

is the problem of the present time, than which there is no other more urgent or imperative. Livingston's code solved this problem by providing a House of Refuge where honest workmen, unable to secure employment elsewhere, should be provided with work at the expense of the State and receive temporary shelter and support, with an interest in the profits of their labor. The State of New York has a quite different way of dealing with the unfortunate members of this class: it sends them to prison! Every year hundreds of honest workingmen, who have committed no offense against the law, but are simply idle "because no man hath hired them," are sentenced to the *penitentiaries*; in many cases this is done on the men's own application to save them from impending starvation. The Warden of Kings County (N. Y.) Penitentiary asserts that men are constantly committed there who have been charged with no crime but are simply out of work and homeless, and he adds: "By our treatment of the unemployed we are *making criminals* of men who have heretofore been honest, self-sustaining members of the community and who would be so again could they obtain work." To sentence these unfortunate men to association with felons and to brand them on their discharge with the ignominious title of ex-convicts is a policy not less cruel and inhuman than it is suicidal to the interests of the State. It may be objected that Livingston's plan savors of socialism, and that the relief it affords had best be left to private charity. But private charity is in fact inadequate, and we are confronted with the existing situation, terrible and fraught with danger. The State supplies food for the starving, shelter for the houseless, medicine and treatment for the sick; why should it not provide work for the deserving workman, when without it he cannot live honestly? Properly safeguarded against abuse, what better plan than Livingston's has yet been proposed to solve the threatening problem of the "unemployed"—indeed, what other possible plan is practical and effective?

It is another glaring defect of our penal systems that persons accused of no crime, but simply detained as witnesses, persons accused of slight misdemeanors, persons accused of the gravest felonies and persons actually convicted and

serving sentence are all confined together, in promiscuous association, in the county jails and places of detention. Many of these persons are actually innocent, and it is an outrage to subject them to this vile companionship; when they are discharged, their souls are pretty sure to be tainted by enforced contact with vice and crime. Livingston was the first to propose separate and secluded confinement of each person in these houses of temporary detention—a reform greatly needed and one which, so far as I know, has never yet been effected.

The treatment of prison labor is an interesting feature of the code. The convict, upon his entrance into the penitentiary, was to be confined in a solitary cell, where for a period of forty-eight hours he was to have no employment, no books and no companionship except that of his own reflections. His bed was hard, his food wholesome but meager, and the deprivation of employment a part of his punishment. At the expiration of this initial period, the convict was offered the privilege of labor and told how, by industry, he could gain an alleviation of his condition, more comforts in his cell, more abundant and palatable food, the use of books to read, visits from his friends, instruction in a class; but all these things were the fruit of labor, not to be gained except by diligent industry. Thus labor was never made compulsory, it was offered as a boon, as the only means of gaining comforts and contentment. If the convict, in a spirit of defiance and revolt, refused to work, he was subjected to no coercion, but only lost the fruits of labor. He returned to the original cell, the hard bed, the meager fare, the solitary life, and there he remained until his soul cried out for employment, for the diversion and comforts which in all the world can be won only by industrial labor. In this way, work could come to be regarded, not as a hateful task, part of the punishment, but as the only road to advancement, self-improvement, happiness; and the healthy life-giving *habit* of labor was formed.

Most of those principles and practices which have been developed by experiment in recent years as the bases of a sound prison science were evolved by Livingston's thought and embodied in the codes. Thus, among others: the indi-

vidual treatment of convicts, criminal statistics, measurements identifying criminals nearly anticipating Bertillon, instruction both mental and religious, the exalted office and supreme authority of the warden, the avoidance of vicious associations among prisoners and the dominating aim at reformation. It is no derogation to Livingston to assert, however, that the world does move. The most radical and important step in progress that penology has ever made is the invention of the indeterminate sentence for crime, with its accompanying conditional liberation. Of this great advance, which overturns the very foundations of the old criminal law, which eliminates the unattainable aim of a code to fit in advance the penalty to the crime, which treats the criminal, as any other abnormal human creature dangerous to the public is treated, by keeping him in confinement until he is cured and releasing him only when it is safe for the community to release him—of this new philosophy, no glimpse was vouchsafed to the prescient mind of Edward Livingston.

The Livingston code, immediately upon its publication, elicited enthusiastic expressions of admiration and approval from eminent authorities on both sides of the Atlantic. Some of the letters written by distinguished men to Livingston (which are preserved in his biography) are interesting as showing how far the writers were able to anticipate the verdict of posterity. Thomas Jefferson wrote, in the somewhat magniloquent phraseology of the day: The Code "will certainly arrange your name with the sages of antiquity." James Kent wrote: "You have done more in giving precision, specification, accuracy and moderation to the system of crimes and punishments than any other legislator of the age, and your name will go down to posterity with distinguished honor." Victor Hugo wrote to him: "You will be numbered among the men of this age who have deserved most and best of mankind;" and Henry Sumner Maine pronounced Livingston "the first legal genius of modern times."

The code was republished in France and in England; and Jeremy Bentham proposed that a measure should be introduced in Parliament to print the whole work for the use of the English nation. It has been alleged that Living-

ston drew his code from the writings of Bentham. While Livingston was familiar with those writings and gained suggestions from them, it is undeniable that he reached a far higher and broader plane of thought and developed a more comprehensive system than was ever attained by the mind of Jeremy Bentham.

The code was not adopted by the State of Louisiana; it involved an entire reconstruction of the whole penal organization of the State and was beyond the limitations of the time, but it presented high ideals toward the attainment of which the world has ever since been advancing. The study of Livingston's work has often recalled to my mind this eloquent passage from Macaulay :

"The highest intellects, like the tops of mountains, are the first to catch and to reflect the dawn. They are bright, while the level below is still in darkness. But soon the light, which at first illuminated only the loftiest eminences, descends on the plane and penetrates to the deepest valley. First came hints, then fragments of systems, then defective systems, then complete and harmonious systems. The sound opinion, held for a time by one bold speculator, becomes the opinion of a small minority, of a strong minority, of a majority of mankind."

EUGENE SMITH.